

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6782 of 1986

Hon'ble MR.JUSTICE S.M.SONI

AND

Hon'ble MR.JUSTICE Y.B.BHATT

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

SAIFULLA MIYA KASAM MIYA THAKORE

Versus

DIST SUPERINTENDENT OF POLICE

Appearance:

MR PB SHARMA for Petitioner

MR TH SOMPURA for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and

MR.JUSTICE Y.B.BHATT

Date of decision: 23/10/96

ORAL JUDGEMENT(Per S.M. Soni J.)

1. The petitioner-unarmed police constable has filed this petition under Article 226 of the Constitution of India and prayed for a writ of mandamus or order or direction in the nature of mandamus directing the respondents to promote him with effect from 19.1.1980 to the post of Head Constable Grade-II with all consequential benefits including his original seniority,

and also for a direction to treat the period of suspension with effect from 18th February 1977 to 30th September 1977 as of duty period and grant duty pay to the petitioner and all other consequential benefits arising therefrom.

2. The facts leading to the present petition are as under:

2.1 The petitioner was selected and appointed as Unarmed Police Constable in the police establishment of DSP, Kheda with effect from 24th April 1973. The petitioner had thereafter passed the SSC Examination in the year 1978. At the relevant time there was a rule framed by the Government of Gujarat to the effect that 33 1/3% of the post of Head Constable Grade-II, which is a promotional post for constables, was to be filled in by promotion from amongst the constables having passed the SSC examination by seniority-cum-proved merit and efficiency under Rule 70(8) of Gujarat Police Manual.

2.2 The petitioner came to be prosecuted on a charge under section 85(1)(3) and 66(1)(B) of the Bombay Prohibition Act and was placed under suspension with effect from 10th March 1977, on the allegation that he indulged in drinking liquor along with others. After a fullfledged trial by the Judicial Magistrate (First Class), Petlad, the petitioner was acquitted on his defence being accepted by judgement and order dated 2nd August 1977 in Criminal case No.359/77. Pursuant to the aforesaid order of acquittal the petitioner was reinstated in service by an order dated 28th September 1977.

2.3 According to the petitioner, as he came to be reinstated in service on being acquitted from the criminal charges levelled against him, he then was entitled to be promoted in accordance with the rules as per seniority. The petitioner contended that as he was acquitted, his period of suspension was required to be treated as on duty. The petitioner being not promoted as per rules and as per seniority, and as the suspension period was not treated as 'on duty', the present petition came to be filed after numerous representations made before the concerned authority.

3. The action of the authority in not promoting the petitioner is challenged on the ground as being arbitrary and violative of Articles 14 and 16 of the Constitution of India inasmuch as his juniors were promoted to the post of Head Constable Grade-II.

4. At the outset we may state that so far as the contention pertaining to suspension period is concerned, we do not propose to pass any orders in respect of the said prayer. Any order that may be passed pertaining to treating the period of suspension, either on duty or as such, is admittedly an appealable order. The suspension period came to be treated as such by an order dated 12th May 1980. The said order has been challenged by the petitioner in this petition filed on 31st December 1986 and that too only incidentally. If the petitioner had made number of representations, then it was necessary for the petitioner to pursue that in accordance with service rules provided under the law. We are, therefore, of the opinion that when a statute has specifically provided for appeal against particular order, and if appeal is not filed and the period of limitation has expired since six years before, in the interest of administration of justice the legality of that order need not be considered. We, therefore, do not consider the legality of that order of suspension period being treated as such.

5. Notice of rule being served on the respondents, one Mr. K.J. Ahuja, Deputy Superintendent of Police (Head Quarter), has filed affidavit in reply on 3rd October 1996 and has also filed further affidavit in reply on 10th October 1996. In the affidavit in reply of 3rd October 1996 it is stated as under:

"I say that a meeting of the department promotion committee was held on 16.4.1979. In that meeting the name of the petitioner was not considered. Thereafter another Department Promotion Committee was held on 26.3.1980; that committee did not find the petitioner was not selected for promotion as the petitioner was reinstated in service on being acquitted in prohibition case and the treatment of suspension period was yet to be decided."

It is further stated in the said reply as under:

"I say that it is true the SSC passed UPC were eligible for promotion to the rank of UHC Grade-II as per IGP, Gujarat State, Ahmedabad No.B/903/Kheda/78/927 dated 18.1.1979 i.e. before the issued of G.R.H.D. No.GG/254/EST/1772/3158/C dated 6.8.1979 whereby new recruitment rules for the posts of Head Constables Grade I and II were made. The said Recruitment Rules did not provide for filling up

of 33 1/3 per cent of posts of Head Constables by promotion of Constables who had passed the SSC Examination. However, the said Recruitment Rules of 1979 had not been intimated to the office of the District Superintendent of Police and hence promotions were given in 1980 under the earlier Rules in which there was such provision."

It is further stated that "it is true that UPCs juniors to the petitioner were promoted in 1980 and they were selected by the Department Promotion Committee held on 16.5.1979 and 26.3.1980; that the details given in paragraph 9 of the petition regarding the issue of promotion to the petitioner's junior UPCs vide DSP Kheda's order dated 19.1.1980, 8.4.1980 and 20.5.1980 are substantially correct; that it is true that the petitioner had represented his case to the respondent no.2 and no.3 and that the respondent no.2 has submitted report to the respondent no.3 soliciting further instructions vide No.MKM/260/SC/1981 dated 24.4.1981 as to whether S.S.C. passed constables, who were promoted to the rank of UHC Grade-II may be continued or otherwise".

6. Thus, from the affidavit-in-reply it is clear that the case of the petitioner for promotion was not at all considered by the Department Promotion Committee held either on 16th April 1979 or on 16th May 1979. We state these two dates because in the affidavit in reply in para 3 it is stated that the Department Promotion Committee was held on 16th April 1979, while in para 8 it is stated that the meeting of the committee was held on 16.5.1979. Either of the date may be correct or both may be correct, but in any case the petitioner's name was not considered in the meeting held on both those dates. Now there is a settled legal position that it is a right of an employee to be considered for promotion if he is otherwise eligible for being considered. Admittedly, as mentioned above, from the affidavit it is clear that the juniors to the petitioner were considered and promoted. Therefore, there does not appear any reason as to why the case of the petitioner was not considered by the Department Promotion Committee held on 16th April 1979 or 16th May 1979.

7. The promotion rules which prescribed for the quota of 33 1/3 for SSC passed police constables were in force when the petitioner came to be reinstated in service and even thereafter when the Department Promotion Committee held on 16th April 1979. The said rules came

to be repealed with effect from 1st August 1979. That apart, despite the said rules being repealed, the respondent no.2 had promoted constables to the post of Head Constable Grade-II based on that rules even in the year 1980. The explanation tendered by the respondent in this context in the affidavit in reply is to the effect that they were not in know of those rules being repealed. They have therefore, sought necessary directions as to what is to be done about those promotions. We are not concerned for the moment as to what happens to those promotions because the case of the petitioner is governed by the rules before repeal and his case was required to be considered in the quota of 33 1/3% as he has passed the SSC Examination in the year 1978.

8. As stated above, it is the right of an employee to be considered for promotion if he is otherwise not qualified for promotion. In the present case there is nothing on record to show, nor even in the affidavit in reply, that the petitioner was otherwise ineligible for being considered for promotion under the said quota. No attempt has been made to offer any explanation as to why the name of the petitioner was not considered by the Department Promotion Committee held on 16th April/May 1979. It is also to be noted that there is nothing on record to show or suggest that even if the name of the petitioner was placed before the Department Promotion Committee, the petitioner could not have been promoted on the relevant facts available with that committee. Under the circumstances we are of the opinion that the reliefs sought by the petitioner to the aforesaid extent is required to be granted.

9. The petitioner has been granted promotion with effect from 30th July 1992. Therefore he is required to be given deemed date with effect from 19th January 1980 as claimed by the petitioner. Accordingly this petition is partly allowed. Petitioner is deemed to be promoted with effect from 19th January 1980 and be paid all consequential benefits flowing therefrom in the light of the deemed date. Rule is made absolute to the aforesaid extent.
